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DEPARTMENT OF AGRICULTURE RURAL ELECTRIFICATION ADMINISTRATION

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RECENT CASES

Bylaws - Action by directors contrary to bylaws as a waiver of the bylaws where directors have power to amend

The board of directors of the defendant cooperative association entered into a contract whereby it agreed to have the plaintiff act as a comptroller for a certain length of time. The bylaws of the defendant cooperative provided that such a contract might be made by the directors only to last so long as the directors desired it to last. However, the bylaws were subject to amendment and revision by directors. Held, judgment for plaintiff. Hill v. American Cooperative Association, 197 So. 241 (La. 1940).

The rule of the court is that since the board of directors had the power to adopt and amend bylaws then it had the right to waive the bylaws unless restricted by statute. The taking of action in the face of an opposing provision in the bylaws was equivalent to waiver. The discussion of the court on this point is as follows:

"Fletcher in Section 4200 of the Permanent Edition of his work on Corporations says: 'When the board of directors has power to adopt by-laws, it has power to waive those adopted, unless the right of waiver is authoritatively limited, as by the statute, charter, or certificate of incorporation * * *' Continuing, the author states: '* * *but when the power to make by-laws is vested in the stockholders or members, and they have made by-laws for the protection of the corporation, they cannot be waived by the directors or other officers of the corporation.' (Italics ours)

"The Appellate Court of Indiana in a recent case, citing the above section from Mr. Fletcher's work, said: 'Since the board of directors have power to adopt the bylaws they, of necessity, have power to waive the bylaws, unless this right is restricted by statute.' State ex rel. Guaranty Building & Loan Company v. Wiley, 100 Ind. App. 438, 196 N.E. 153, 154.

"Act No. 250 of 1928 declares that 'Any officer or agent may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby; such removal, however, shall be without prejudice to the contract rights of the person so removed.' Section 35, Subsection IV. The act also provides that 'if the articles /of incorporation/ so provide, the board of directors may make and alter by-laws, subject to the power of the shareholders to change or repeal the bylaws so made * * *'. Section 29, subsection I.

"Under the express authority of defendant's charter its board of directors was given the power 'to make, alter, and change * * * the by-laws of this association' and our opinion, therefore, is that the board of directors of the association, by its action of April 23, 1937, electing the plaintiff to the office of comptroller for a period of a year at a yearly salary of $10,000 thereby abrogated the by-laws to that extent."

Easements - Validity of an easement not described by metes and bounds

Plaintiff sought an injunction to prevent the defendants from interfering with plaintiff's easement over defendant's land and requiring defendant to remove all obstacles to use of the easement. The validity of the easement was contested on several grounds, inter alia, the fact that the easement granted was not defined by metes and bounds. Held, judgment for the plaintiff. Kotick v. Durant, 196 So. 802 (Fla. 1940).

The rule, as stated by the court, on this point is as follows:

"The validity of an easement of way over the land of another is not impaired, although not defined by metes and bounds in the instrument by which it is created, the dominant tenant being entitled to a convenient and suitable way, depending on the conditions of the place and the purposes for which it was intended. McKenney v. McKenney, 216 Mass. 248, 103 N.E. 631. Failure to describe the boundary of a right of way in granting an easement does not render the grant void."

Municipal Corporations - Effect of invalid votes insufficient to change result of an election on the question of issuing revenue bonds

Contestants brought an action to contest the validity of an election held by the defendant city for the purpose of determining whether the city should be authorized to issue revenue bonds to provide funds to build and purchase a city lighting and power system. Among the points raised by the contestants there were six votes challenged which might have been sustained by the court. As to these six challenges the court held that since even if all of them were sustained they would not be sufficient to change the result of the election (which was carried by 13 votes) then the challenge was immaterial and would not be considered. Dubose v. Ainsworth, 139 S.W.(2d) 307 (Tex. Civ. App. 1940).

Negligence - Applicability of the doctrine of res ipsa loquitur to a defective kitchen stove

Defendant power company installed an electric kitchen stove in plaintiff's home. She used it for two weeks and it worked well. Then, one day, plaintiff was doing some baking. To remove the food, she bent down on one knee in front of the stove door and with the other turned the switch off. Immediately a charge of electricity flared before her face, temporarily blinding her. Plaintiff sued in tort to recover for her injuries, alleging that defendant was negligent in supplying a defective stove and also in passing an excessive current of electricity through the stove. Plaintiff relied upon the doctrine of res ipsa loquitur to supply her burden of proof as to defendant's negligence. She simply described the events leading to the injury, and rested. Defendant offered no evidence on either the point of whether the stove was defective or whether it had supplied an excessive current. The jury found the plaintiff had used the stove in a normal fashion during all the time before the accident in which the stove was in her home. From a judgment for plaintiff, defendant appealed. Held, judgment affirmed. Peterson v. Minnesota Power and Light Co., 291 N.W. 705 (Minn. 1940).

The doctrine of res ipsa loquitur was properly applicable. There is no question that the doctrine is appropriate on the question of the supply of electricity, since defendant was in sole control of the energy and flashes of electricity are not ordinarily emitted from stoves in good order. A more difficult question is presented whether the doctrine is applicable to prove that the stove was defective, since plaintiff was in control of the stove for two weeks before the injury. But even here the doctrine of res ipsa is appropriate, since defendant was in control at the time when the stove was installed and it need not be in control at all times until the very moment of the accident, the jury having found that plaintiff had not misused the stove in the intervening time. "Control is not necessarily

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a control exercised at the time of the injury, but may be exercised at the time of the negligent act which subsequently resulted in the injury."

The court recognized that whether the doctrine of res ipsa should be applied is "largely a question of how justice in such cases is most practically and fairly construed," and held that justice demanded that the doctrine be applied in this case since plaintiff could not, as a practical matter, recover if the benefit of the doctrine was denied to it. (The court, in this case, did not indicate just what is the legal effect of the doctrine of res ipsa, but at least it must have entitled this plaintiff to get to the jury.)

Negligence - Failure to remove a fire hazard over a transmission line as contributory negligence

Plaintiff owns a small farm set back off the highway. In the space between the house and the highway there were four or five large oak trees including one that was dead. One day a severe windstorm went through the trees breaking off one large limb and lodging it in the fork of the dead tree. This was about 10 feet east of the defendant's transmission line that was constructed along the highway. The broken limb extended so that it was two or three feet above the transmission line. Plaintiffs contend that during another severe windstorm a few months later the high voltage current carried by the line caused a fire to the limb which spread to the dead tree and finally consumed the house. Upon trial there was a verdict for the plaintiffs. Held, affirmed. Porter v. Iowa Electric Co., 292 N.W. 231 (Iowa, 1940).

The primary defense of the power company was the fact that the plaintiff owned the trees and had knowledge of the conditions and the failure to act to remedy it constituted contributory negligence which barred the plaintiff from recovery. In defense on this point the plaintiff demonstrated that he had requested the manager of the power company to shut off the current in order that he might cut down the dead tree but that no action had ever been taken to permit this. The court felt that under these facts it could not be said as a matter of law that the plaintiff had been contributorily negligent. The court stated that even assuming that the plaintiff was under duty to protect his property from the fire hazard, nevertheless, he acted as a careful prudent person and consequently was not guilty of contributory negligence.

Public Corporations - Power to issue refunding bonds in absence of statutory power so to do

A Washington statute created a toll bridge authority and expressly granted to it the power to issue revenue bonds. There was no provision in the statute for the issuance of refunding bonds. Washington v. Yelle, 9 U.S. Law Week 2269 (Wash. Sup. Ct., Oct. 1, 1940). Held, that the authority had implied power to issue refunding bonds.

Telephone Interference - Non-liability of cooperative for damages caused by inductive interference

Plaintiff brought an action against the defendant electric membership association to recover damages to a telephone system owned by the plaintiff which he alleged was negligently damaged by means of electric induction. The trial resulted in a verdict and judgment for the plaintiff in the sum of $800 and from that judgment the appellant electric cooperative appeals. The court describes the situation as follows:

"Appellant is a corporation organized under Chap. 184 of the Laws of 1936, and its system was constructed with the advice and financial aid of the 'Rural Electrification Administration'. It distributes electricity to homes, schools and churches. It serves a large number of patrons who are also served by appellee's telephone system. For approximately fourteen miles, it parallels the line of the telephone system, the distance between them ranging from something like twelve feet to three hundred feet. Appellant's system carries more than 11,000 volts of electricity. 11,000 volts are commonly used. The telephone line is of low voltage. The result was that appellant's distribution system destroyed and rendered useless the telephone system by induction. Appellee, however, could have avoided that result by the installation of a second wire for the return circuit instead of using the earth for that purpose. There is no defect in appellant's distribution system. It is the approved system commonly in use. On the other hand, the one line telephone system is not in use and cannot be used except when so isolated that its use cannot be interfered with by induction from some other electrical system."

Held, judgment reversed and judgment for appellant. James County Electric Power Assn. v. Robinson, 196 So. 510 (Miss. 1940)

The rule of the court is that since the defendant had used scientifically approved modern instrumentalities and methods in the construction and operation of its lines, and since the plaintiff was able to avoid damage by the adoption of modern methods, (installation of a return conductor) it necessarily followed that the plaintiff could not recover damages from the defendant. The primary contention of the plaintiff was that the constitutional prohibition against the taking of property for public use without compensation made it imperative that the plaintiff receive damages for the injury to the telephone system. The answer of the court on this point was succinctly stated in the following language:

"Appellee acquired no property right in the continuance of the one wire system."

ADMINISTRATIVE INTERPRETATION

Commission Jurisdiction over Manner of Operations of Facilities

A complaint was filed that the respondent power company, in the operation of its steam electric generating station, caused large volumes and clouds of smoke, cinders, ashes and dirt to be deposited upon the surrounding lands and buildings, thereby killing crops, impairing the fertility of the soil, and impairing the health of the complainant's families. The complaint was filed under the Public Utilities Law which provided that the Commission should have jurisdiction over complaints that the service of any utility was "unreasonable, unsafe, inadequate, etc." Held, that the Commission does not have jurisdiction over subject matter such as nuisances. Stump v. Pennsylvania Power & Light Company, 35 P.U.R. (n.s.) 59 (Pa. Pub. Util. Comm. 1940)

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A-347	Applicability of Hatch Act to REA project attorneys
A-349	Judgments as liens on personal property in other counties (Ga.)
A-350	Effect of a valid Virginia acknowledgment in Tennessee
A-359	Foreign corporation qualifying in Arkansas
A-360	Georgia Membership Corporation qualifying in Florida
A-362	Cost of maintenance of underground lines in "just compensation" in proceedings to condemn overhead crossing.
A-363	Right of village to sell electric plant to cooperative without approval of electors (Ill.)

The Legal Division welcomes the following attorney to the staff:

Sanford M. Stoddard

Iowa Law School; Editorial Staff, Iowa Law Review (1933); Private Practice, Mason City, Iowa, 1933; Attorney, Federal Land Bank of Omaha, 1934-1935; Attorney, Farm Credit Administration, Land Bank Division, 1935-1940. Mr. Stoddard will be in the Tax Unit.

LEGAL MEMORANDA RECEIVED IN SEPTEMBER

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A-351 Cooperatives duty to serve non-members on lines acquired from public utility (Michigan)

A-352 Statutory provisions in regard to statement of liens in motor vehicle title certificate

A-353 Power of REA to finance housing facilities for employees of borrowers

A-354 REA loan to municipality to enlarge plant to extend service to rural cooperative (Oklahoma 26 Harmon)

A-355 Acquisition of utility system within city limits by REA cooperative (Fla)

A-356 Sufficiency of description of property in complaint in foreclosure proceedings

A-357 Legality of method of repayment to cooperatives for transmission lines built for Bureau of Reclamation

A-358 REA loan for extension of lines into rural area by municipal system already pledged (Tenn.)

A-361 Jurisdiction of Secretary of Interior over public contracts and over Virgin Islands

TAX MEMORANDA

T-264 Liability of purchaser of business for unpaid payroll taxes (Mich.)

T-265 Exemption of REA cooperatives from State Unemployment Insurance Taxes

T-266 Tax liability on property acquired (Mo.)

T-267 Exemption of cooperative from unemployment tax (Oregon)

T-268 Unpaid officer of corporation as an employee within meaning of Unemployment Tax (Colorado)

T-269 Factors determining liability for taxes on property acquired in S.D.

T-270 Applicability of Federal Energy Tax to rural utility organized for profit (Va. 20 Prince William)

T-271 Statutory exemption of REA cooperatives from excise tax in Fla. & Ga.

T-272 Imposition of annual corporation tax to REA cooperatives in Kansas

T-273 Deductions from Ind. Gross Income Tax available to cooperatives

T-274 Taxes applicable to N.H. cooperative doing business in N.H. and Mass.

T-275 Taxes applicable to Vt. cooperative doing business in Vt. and Mass.

T-276 Exemption of cooperatives from sales tax on electricity - Utah

T-277 Taxes applicable to Tenn. cooperative doing business in Tenn. & Ga.

T-278 Taxes applicable to Ill. cooperative doing business in Ill. and Indiana

T-279 Liability of REA cooperative for capital stock tax - Illinois

T-280 Taxes on property conveyed from TVA to REA cooperatives

T-281 Federal Documentary Stamp Tax on conveyance to municipality